This Recommended Liability Determination was followed by a Recommended Order and Decision in the 1st Quarter of 2002.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	**)**
	)
EDDIE J. HARRELL,	**)**
Complainant,	**)**
	)
and	**)Charge No: 1997CF0248**
	)EEOC No: 21 B 962981
	)ALS No: 9911
BARBER-COLMAN CO. n/k/a INVENSYS	**)**
BUILDING SYSTEMS. INC.,	**)**
Respondent.	**)**

RECOMMENDED LIABILTY DETRMINATION

On April 22, 1997, the Illinois Department of Human Rights filed a Complaint on behalf of Complainant, Eddie J. Harrell, alleging that Respondent, Barber-Coleman Co. n/k/a Invensys Building Systems, Inc. discriminated against her on the basis of her race when it discharged her. A public hearing was held on the allegations of the charge on November 2, 3 and 6, 2000. Subsequently, the Parties were ordered to submit closing briefs. The Parties have done so. This matter is ready for decision.

CONTENTIONS OF THE PARTIES

Complainant contends that Respondent unlawfully discriminated against her by discharging her because of her race, black. Respondent denies that it unlawfully discriminated against Complainant.

FINDINGS OF FACT

Those facts marked with an asterisk are facts to which the parties stipulated or facts which were admitted in the pleadings. The remaining facts were determined to have been proven by a preponderance of the evidence. Assertions made at the public hearing which are not addressed herein were determined to be unproven or immaterial to this decision.

1. Complainant's race is black*;
2. Respondent is an "employer" within the meaning of Section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act*;
3. Respondent hired Complainant in 1987.
4. At the time of the relevant incidents, Complainant was working as a S.M.D. Machine Operator*;
5. That, on March 6, 1996, Complainant worked for Respondent in a room known as the "cold room."
6. That on March 11, 1996, Respondent discharged Complainant*.

7. Respondent's stated reason for discharging Complainant is that, after having been issued a verbal warning in May, 1995 regarding such conduct, Complainant made a threatening statement to co-worker Lori Hoskinson (Hoskinson) on March 6, 1996.
8. Complainant made a threatening comment to co-worker Hoskinson on March 6, 1996.
9. This threatening comment included words threatening to "kick" Hoskinson's "ass".[1]
10. Prior to the March 6, 1996 comment by Complainant, Respondent had not given Complainant and Complainant had not received any verbal warning which advised her to refrain from making threatening comments and that, if the threatening comments continued, she would be terminated.
11. There was no written record in the personnel files of a verbal warning regarding threatening comments given in May 1995 to the following six named employees: Julie Becker, Eddie Harrell, Pat Hinkle, Lori Hoskinson, DeeDee Ditman, and Beverly Phillips (formerly Hughes).*
12. Michael Carroll (Carroll) was a human resources manager of salaried employee relations at all relevant times.
13. Leo Binz was Manufacturing Manager during all relevant times.
14. Gary Gulletson was a foreman who reported directly to Leo Binz at all relevant times.
15. Darcy Wilson was Hourly Employee Relations Manager for the Human Resources Department at all relevant times.
16. Pat Gill was a sales team leader and technician at all relevant times.
17. Caroll participated in the decision to discharge Complainant.
18. Wilson participated in the decision to discharge Complainant.
19. Doris Strang (white) and Vanessa Johnson (black) are employees of Respondent at all relevant times.
20. Strang threatened Johnson on February 29, 1996.
21. Both Strang and Johnson received a verbal warning by Respondent for the February 29, 1996 incident.
22. A written memorial of the verbal warning dated March 11, 1996, was placed in the personnel files of Strang and Johnson.
23. Respondent's reason for not discharging Strang for having made the threatening comment to Johnson was because Strang had not received a prior warning.
24. Bob Allard (Allard), white, and Richard Graf (Graf), white, were employees of Respondent during all relevant times.
25. Allard made a threatening comment to Graf on January 5, 1996.
26. A written record of the account of the Allard/Graf incident was made.
27. Wilson made an investigation of the Allard/Graf incident.
28. Wilson made detailed notes of her investigation into the Allard/Graf incident.

[1] Complainant contends that all of the submitted affidavits and Wilson's notes regarding her investigation of the May 1996 incident indicate discrepancies in the exact wording the witnesses heard the Complainant say. I find this argument to be insignificant as the record supports that Complainant was referring to Lori Hoskinsons when she made the statement and the statement refereed to "kick[ing]" Hoskinson's "ass." Further, the record supports that Respondent conducted a reasonable investigation and all of the witnesses heard Complainant say "kick" and "ass".

29. Allard and Graf were given a verbal warning.
30. Respondent's reason for not discharging Allard for making the threatening comment to Graf was because Allard had not received a prior warning.
31. During Wilson's investigation into the Allard threat, Allard made a complaint January 8, 1996 to Wilson that Graf constantly makes negative racial comments about other co-workers and that Graf had made a shooting gesture toward a black employee and said "Bang."
32. Wilson was not aware of any witnesses to the "shooting gesture" incident and made little effort to investigate Allard's allegations against Graf concerning the "shooting gesture."
33. Graf had been suspended for fighting in 1992.
34. Prior to the March 6, 1996 incident with Complainant and Hoskinson, there was no evidence that any employees or management personnel ever heard Complainant make any threatening statements to anyone.
35. Employees stationed in and around the "cold room" had on-going differences and regularly engaged in bickering.
36. The culture at Respondent's workplace was such that disagreements, bickering and co-workers' inability to get along were regular occurrences.
37. Gulletson regularly reminded employees in the cold room to stop talking and to get their work done.
38. The Respondent had a Standards of Conduct procedure in place during the relevant times.
39. The Respondent did not necessarily nor consistently follow its disciplinary measures as set out in its Standards of Conduct.

CONCLUSIONS OF LAW

1. The Human Rights Commission has jurisdiction over the parties to and the subject matter of the Complaint.
2. Respondent is an "employer" as defined by the Act.
3. Complainant bears the burden of proving a prima facie case of discrimination by a preponderance of the evidence.
4. Complainant has proved, by a preponderance of the evidence, a prima facie case of discrimination based upon her race.
5. Respondent articulated a legitimate, non-discriminatory reason for discharging Complainant.
6. Complainant has proved, by a preponderance of the evidence, that Respondent's proffered reason for discharging Complainant is a pretext for unlawful discrimination.

DETERMINATION

Complainant has proved her claim of race discrimination by a preponderance of the evidence.

DISCUSSION

Complainant alleges that Respondent discriminated against her on the basis of her race (black) when it discharged her on March 11, 1996. Respondent contends that Complainant was discharged for making a threatening statement to a co-worker after having previously been issued a verbal warning in May 1995 regarding making threatening statements to co-workers.

A Complainant bears the burden of proving discrimination by a preponderance of the evidence in accordance with the Act at 775 ILCS 8A-102(I). That burden may be satisfied by direct evidence that an adverse employment action was taken for unlawful discriminatory reasons or through indirect evidence pursuant to **McDonnell Douglas Corp. v. Green**, 411 U.S. 793, 93 S.Ct. 1817 (1973) and **Texas Dept. of Community Affairs v. Burdine,** 450 U.S. 248, 101 S. Ct. 1089 (1981), adopted by the Illinois Supreme Court in **Zaderaka v. Illinois Human Rights Commission**,131 Ill.2d 172, 545 N.E.2d 674 (1989).

In analyzing employment discrimination cases under the **McDonnell-Douglas** three-step approach, the Complainant must first prove, by a preponderance of the evidence, a prima facie case of discrimination, which raises a rebuttable presumption that the employer unlawfully discriminated against her. Once the Complainant has demonstrated a prima facie case, the employer then has the burden of articulating a legitimate, non-discriminatory reason for the adverse employment action. If the employer carries its burden of production, the presumption of discrimination drops and the Complainant is required to meet her continuing burden of proving by a preponderance of the evidence that the employer's articulated reason was not its true reason, but rather, merely a pretext for discrimination. **St. Mary's Honor Center v. Hicks**, 509 U.S. 502, 113 S. Ct. 2742 (1993). The burden of proving that the employer engaged in discrimination remains at all times with the Complainant. **Burdine***, supra.*

A prima facie case using direct evidence usually consists of statements by the employer which explain or reveal the employer's discriminatory motives and can consist of any facts that make it more likely than not that the employer's actions were motivated by unlawful discrimination. A Complainant may establish a prima facie case through direct evidence by presenting evidence of facts, which raise an inference of discrimination. Such facts would require Respondent to articulate a reason for its actions, **Mott and City of Elgin**, __Ill.HRC Rep. __ (1986CF3090, June 30, 1992).

A prima facie case using indirect evidence may vary somewhat according to the nature of the claim made and the factual situation presented. **Turner v. Human Rights Comm'n**, 177 Ill.App.3d 476 (1988); **Valley Mould & Iron Co. v. Human Rights Comm'n**, 133 Ill.App.3d 273 (1985). In general, the Complainant must show that (1) she is a member of a protected class, (2)she suffered an adverse employment action, and (3) similarly situated employees outside of the protected class were treated more favorably. **Dixon and Borden Chemical**, 46 Ill. HRC Rep. 116 (1985), **Sheffield and Wilson Sporting Goods Co**., ___Ill. HRC Rep., (1990CF1450, May 7, 1993); **St. Mary of Nazareth Hospital Center v. Curtis**, 163 Ill. 3d 566 (1987); **Freeman United Coal Mining Co. V. Human Rights Comm'n** 173 Ill. App.3d 965 (1988), **ISS International Service**

System, Inc. v. Illinois Human Rights Commission, 272 Ill.App3d 969, 651 N.E.2d 592, (1995).

Complainant's Prima Facie Case

It is undisputed that Complainant is a member of a protected class in that she belongs to a racial minority (black) and that Complainant suffered an adverse employment action when she was discharged after the employer determined she had made a threatening statement to another co-worker.

Although Complainant denies having made the threatening statement, Complainant contends that other white co-workers had made threatening statements -- Robert Allard (Tr. at 222) to Richard Graf, (Tr. at 214) and Doris Strange (Tr. at 224) to Vanessa Johnson (Tr. at 224) -- however, neither Allard nor Strang was discharged as was Complainant. Complainant contends that Respondent afforded more favorable disciplinary treatment to its white employees and applied its discipline policies more harshly to Complainant. The record supports that other white co-workers had made threats and were not discharged.

It is undisputed that Complainant was involved in a verbal confrontation with another co-worker, Lori Hoskinson, on March 6, 1996. However, the account of that confrontation is in dispute. Complainant contends that, at the end of her workday, she stepped to the door of the cold room to look for a co-worker and friend, Shirley Hancock, (Tr. at 677) when Hoskinson asked her if she had "a problem" (Tr. at 542). Complainant then told Hancock that the next time she goes into the office to leave Complainant's name out of her mouth (Tr. at 542). Hoskinson then began talking back to Complainant when the bell to leave for the day rang and Complainant told Hoskinson, "I'll see you outside of here" (Tr. at 542).[2]

Respondent contends that, during the March 6, 1996 encounter, Complainant threatened to "kick" Hoskinson's "ass". Respondent conducted an investigation and determined that Complainant did make a statement threatening to "kick" Hoskinson's "ass" and discharged Complainant on March 11, 1996 for making that threat .

Darcy Wilson testified that co-workers Robert Allard and Richard Graf had an altercation on January 5, 1996, which she investigated. Wilson testified that, at a subsequent meeting concerning the altercation, Allard admitted to her that he had said specific words that he meant to be a threat to Graf (Tr. at 806). Carroll also testified that Allard's statement to Graf was a taken as a threat (Tr. at 62). Wilson testified that both were given a verbal warning (Tr. at 222) and neither Graf nor Allard were discharged for this incident. Parties admitted into evidence a security report that details an account of this incident.

[2] Complainant testified that her comment to Hoskinson referred to an incident earlier that day when Hoskinson had gone into Pat Gill's office and complained that Hancock talks to Complainant too much during the day. Gill then advised Complainant that, if Hancock comes into her work area, she should tell Hancock that she could not talk to her and ask her to leave the room. (Tr. at 542.)

The report indicates that Allard said to Graf "That's O.K., I'll have my day." Graf then asked Allard, "Is that a threat?" and Allard turned and pointed at Graf and said "Yes!".

Wilson further testified to an incident on February 29, 1996 involving co-workers Doris Strang and Vanessa Johnson. Wilson testified that Johnson reported that Strang had asked Johnson to step outside to settle their differences. Carroll testified that this offer from Strang to Johnson would have been considered a threat (Tr. at 67). Wilson testified that both, Strange and Johnson, were issued a verbal warning relating to this incident dated March 11, 1996, and that, although Johnson had not made any threat to Strang (Tr. at 223), a written letter of the verbal warning was placed in both of their personnel files. The March 11, 1996 warning was admitted into evidence.

Complainant has demonstrated a prima facie case, by showing, through competent evidence, that other white similarly - situated co-workers had engaged in similar threatening conduct and were not discharged. Therefore, in accordance with the **McDonnell-Douglas** analysis, the employer must meet its burden of articulating a legitimate non-discriminatory reason for discharging Complainant for threatening a co-worker.

Employer's Articulation

Respondent's articulated reason for discharging Complainant for making a threatening statement and for not discharging Strang and Allard for similar conduct is because Complainant had been given a prior warning about making threatening statements and Strang and Allard had not.

Carroll testified that he participated in the decision to terminate Complainant (Tr. at 94,112) and felt she should be terminated because she had been specifically warned about "subsequent behavior of this nature" (Tr. at 94). Wilson also testified that Complainant's termination was appropriate based upon the May 1995 previous verbal warning that she had received (Tr. at 304, 749) and that Strang was not discharged for her conduct because it was her first offense (Tr. at 785).

Carroll testified that the incident between Strang and Johnson and the incident between Allard and Graf were treated consistently with the Complainant's incident because Strang and Allard had not been given prior warnings and Complainant's prior warning, along with the current threat, compelled the Respondent to terminate Complainant (Tr. at 115). Carroll testified that, in accordance with the Standards of Conduct[3], threatening comments are classified as a Category I Violation, which may warrant immediate termination; however, the company generally would give employees "the benefit of the doubt."

[3] Although the employer had a Standards of Conduct manual in place during the relevant period, the record supports that the procedures therein are either sporadically or rarely followed. Carroll's testimony indicates that he was not familiar with the procedures; Binz' testimony indicates he was not familiar with the procedures.

Complainant's Proof of Pretext

Employers are free to institute whatever disciplinary standards they see fit; however, these standards must be applied equally to all employees without regard to their gender, race, age, or other prohibited classification. **MSQuery and Wal-Mart stores, Inc**., __ Ill. HRC Rep. __ (1996CF0009, November 20, 1998) citing **McDonald v. Santa Fe Trail Transportation Co.**, 427 U.S. 273 (1976); State Dep't of Corrections v. Clay, 135 Ill.App.3d 710, 427 N.E.2d 1080, (5th Dist. 1985); **Loyola University of Chicago v. Illinois Human Rights Comm'n,** 149 Ill.App.3d 8, 18, 500 N.E.2d 639,646, (1st Dist. 1986).

Whether Respondent's proffered reason for discharging Complainant is pretextual can be determined by the existence of the May 1995 prior verbal warning. Respondent articulates that the only reason Complainant was discharged for making the March 1996 threat was because Complainant had received a previous verbal warning not to engage in threatening conduct. Respondent contends that the only reason Strang and Allard were not discharged for their threatening behavior is because neither had received a previous warning prior to their own respective infraction.

I am unconvinced that Complainant received a warning regarding making threats to co-workers in May 1995. Credibility as to the absence of this warning weighs on the side of Complainant.

Carroll testified that he met with six employees in May 1995 -- Julie Becker, Lori Hoskinson, Eddie Harrell (Complainant), Dee Dee Ditman, Pat Hinkle and Beverly Phillips (Tr. at 69) -- and warned them that if there were further occurrences of threatening or harassing comments among the six, further disciplinary action would result. (Tr. at 74). Carroll testified that he and Wilson attended the May 1995 meeting in which the warning regarding threats was made to the six employees; however, he could not recall who first informed him of the incident in which the purported threats had been made and which prompted the meeting. Also, his testimony was conflicted as to whether he met with the employees separately or as a group (Tr. at 69 and Carroll's Aff.) and he was unsure of which management personnel were in attendance at that meeting . Carroll testified that a written record of verbal warnings would normally be signed and would go into an employee's personnel file to be placed there by "someone in Human Resources" (Tr. at 59-60). However, it was stipulated that no such written record was placed in any of the six employees' files and Carroll could not recall any specific threatening statements that any of the six employees had made that prompted the May 1995 meeting. Further, Carroll could not recall if a written record was made of the oral warning and he didn't think he discussed with Wilson any specific threatening comments purportedly made by any of the six employees which promoted the May 1995 meeting.

Wilson testified that she sat with Carroll during the May 1995 warning meeting to the six employees, that each of the six were interviewed individually (Tr. at 225), and that each was given a verbal warning for making threatening and harassing statements to other employees (Tr. at 226). However, Wilson could not recall any specific threatening statements that the Complainant had made, Wilson made no investigation of the alleged

threats (Tr. at 229), Wilson had no knowledge that Complainant had made any threatening statements at all (Tr. at 227) and Wilson was unsure who complained to her that the threatening statements were made, although she believed it to have been Carroll and Binz (Tr. at 230).

I give Carroll's affidavit of the May 1995 meeting little weight since Carroll admitted that he did not write it, that he does not know who wrote it (Tr. at 71), that he had discussions which led to preparation of the affidavit, but he does not recall with whom, and that, although he refers to threatening comments having been made in his affidavit, he could not identify any specific threatening comment anyone made. Similarly, Binz's affidavit of the May 1995 warning meeting is given little weight as to credibility because Binz testified that he did not compose the entire affidavit, he does not remember to whom he gave information to help compose the affidavit (Tr. at 368-370) and he could not remember even one specific threat he referred to in the affidavit (Tr. at 361). Wilson's affidavit regarding the May 1995 warning meeting is also discounted as she, too, could not remember even one threatening comment that she warned either of the six individuals about (Tr. at 227) and she could not remember specifically who reported to her that threatening comments were made (Tr. at 228). Wilson testified that she personally wrote the affidavits of Mike Carroll, Leo Binz (Tr. at 250) and Pat Gill (Tr. at 257) and that she wrote them in January 1997, approximately 2 years after the May 1995 meeting to which they refer.

Complainant testified that she was not warned about nor accused in May 1995 about threatening anyone (Tr. at 563) and that she never met with Wilson, Caroll or Biz regarding making threats to anyone. Complainant testified that no one had accused her of threatening anyone in May 1995 and no one had said anything to her about threatening anyone before she received a letter about her termination from the employer after she was discharged on March 11, 1996 (Tr. at 567).

Gulletson testified that he routinely gave general verbal warnings to the workers in the cold room that they were talking too much or to get the work out (Tr. at 444, 466-468); however, he never gave any warnings to them concerning threats and he never gave Complainant a verbal warning about making threats (Tr. at 445, 450-451)

Beverly Phillips, one of the six employees who was named as having received the May 1995 warning, testified that she had never been warned by Carroll, Wilson or Binz about threatening or harassing other employees. (Tr. at 325 and 352). Dora Ditman (AKA Dee Dee Ditman) testified that she never met with Wilson or Carrol in May, 1995 and that she was never warned for making threats to anybody (Tr. at 481). Ditman recalled a meeting with a group in Carroll's office the Spring of 1995; however, she could not recall who attended the meeting or what was discussed.

Respondent argues that Complainant's answer to interrogatory #7 refers to the May 1995 warning that is at the heart of this matter. I disagree. Complainant's answer to interrogatory #7 is of no relevance because Complainant testified that she had no independent actual or personal knowledge of the incident she referred to in her

interrogatory answer #7. According to Complainant, this incident referred to complaints made about Hoskinson's hostile statements and actions toward Shirley Hancock (a friend and co-worker of Complainant) which resulted in Hoskinson receiving a verbal warning about making threatening statements and a supervisor warning all employees not to harass their fellow employees. Complainant testified that she was not involved in any of the complaints regarding Hoskinson's hostile statements toward Hancock and that her answer to this interrogatory concerning the complaints and the warnings relied upon information she had received from Shirley Hancock. Therefore, the information in this interrogatory has no bearing on the purported May 1995 meeting.

Only three of the six employees purportedly involved in the May 1995 meeting testified at hearing. I did not hear from Julie Becker, Lori Hoskinson or Pat Hinkle. Of the three that testified –Complainant, Ditman and Phillips-- all maintain they have never been warned about making threats to fellow co-workers.

Binz was questioned about his affidavit, which indicates he attended the May 1995 meeting and warned the six aforementioned employees reading making threatening remarks. Binz testified that he was informed in 1995 by Gary Gulletson that there were threats being made; however, he could not recall even one threat that Gulletson told him had been made, he could not recall if Gulletson specifically reported to him that Complainant had made any threats (Tr. at 360-362) and he never heard Complainant make any threatening remarks (Tr. at 389). Binz testified that he could not remember who was present at the May 1995 meeting and that he made no written record of the verbal warning he gave to the six employees. Binz, just as Carroll and Wilson, could not remember the day the May 1995 meeting took place (Tr. at 391).

Although Binz testified that it was Gulletson who had informed him in May 1995 that threatening comments were being made by the six employees, Gulletson's testimony contradicts Binz. Gulletson testified that he did not report to Binz that employees were making threats to one another (Tr. at 450-451), he never witnessed Complainant making threats to anyone, he never gave Complainant any verbal warnings for threatening anyone, he never heard anyone making threats to anyone (except for a big guy who made a threat personally to him) (Tr. at 445, 476) and no one ever reported to him that anyone was making any threats to anyone (Tr. at 451) until the March 1996 incident between Complainant and Hoskinson.

I find it hard to believe that a written notation of a verbal warning -- which such warning would support an action of termination for a subsequent infraction-- would not have been formally memorialized and placed in the files of the employees to which it referred, especially in light of evidence that the warning to Strang and Johnson for similar conduct was typewritten, specifically detailed as to what was alleged to have been said by both parties and completely dated, as was the security report of the Allard /Graf incident which was typewritten, specifically detailed as to what was alleged to have been said by both parties and completely dated.

In contrast, the only physical evidence that there was any written record of the May 1995 meeting was an unsigned note on yellow note paper approximately 4"x 6" (Tr. at 236) written by Wilson and placed in Wilson's private file. The note indicates that a verbal warning for threatening and harassing others was given to the six employees in May 1995. Although Wilson testified she made this note for her file shortly after the meeting, it does not include a specific day -- only the month and the year (Tr. at 232) -- and it does not include any annotation whatsoever about any specific harassing or threatening statements that any of the six employees had made (Tr. p. 234). Wilson testified she did not place the written note in any of the six employees' personnel files to evidence the May 1995 verbal warning (Tr. at 233) and her only explanation for failing to do so was that she assumed Carroll was going to do it (Tr. at 234).

What is equally difficult to believe is that none of the three management personnel, Binz, Carroll or Wilson, could recall any specific threatening statements that any of the six employees had allegedly made which prompted the May 1995 warning meeting, none of the three remembered the specific date this meeting took place, Carroll could not remember if he met individually with each of the six or if he met with them as a group and Binz could not remember who was present at the meeting. Also remarkable is that the only person named to have reported the occurrence of the 1995 threats to management –Gulletson -- testified that he never reported any threats because he never heard any.

The preponderance of the testimony and evidence supports the finding that Complainant did not receive a warning regarding making threatening comments to co-workers in May 1995; therefore, Respondent's proffered reason for discharging Complainant is found to be pretextual. Further, Complainant has established that the employer treated her more harshly than other similarly - situated white employees by discharging her for making the March 1996 threat, when Allard and Strange had engaged in similar conduct and were disciplined less severely in that they were not discharged.

Damages

The purpose of the damage award is to make the Complainant whole. When the Complainant has been a victim of unlawful discrimination under the Act, she should be placed in the position she would have been but for the discrimination. **Clark v. Human Rights Commission**, 141 Ill. App. 3d178, 490 N.E.2d 29 (1st Dist. 1986).

Complainant requests $100,409.00 in back pay and front pay damages. It is unclear as to how Complainant arrived at this figure; however, the record does not support an award in this amount. A prevailing Complainant is presumptively entitled to full back pay. Therefore, Complainant is entitled to pay back from the date of her unlawful discharge until the date of the hearing, or March 11, 1996 until November 2, 2000. The Commission has ruled that back pay liability ends when a Complainant begins to earn more money than he would have earned with Respondent, **Martin and Sangamon State University**, 48 Ill. HRC Rep. 59 (1989). Complainant testified that she made $24,955 in 1995, her last full year

employed with Respondent (Tr. at 863). Complainant made $34,082 in 1998, $32,082.00 in 1999 and testified that she was on track to make a similar amount in 2000 (Tr. at 865). Thus, there is no backpay liability for 1998, 1999 or 2000.

It is well established that Complainant has a duty to mitigate damages by seeking other employment. Complainant fulfilled this duty by seeking and obtaining work almost immediately following her termination and during each subsequent year. Complainant testified that she obtained a job in April or May 1996 with Attus Health Care working eight hours a week at $4.30/hour (Tr. at 851). In November or December 1996, Complainant obtained a job with Children Development Center working 40 hours a week at 6.50/hour and she continued to work 2-3 hours a week at Attus (Tr. at 851). In March or April 1997, she obtained a position with Promise Land at $8.00/hour working between 20-40 hours a week (Tr. at 853-854). In 1998 she worked for Child Development Center and Youth Services Network -- both are sections of the Illinois Department of Children and Family Services (DCFS) (Tr at 855). At the end of 1998 and in 1999 she obtained a position of Homemaker at DCFS at $8.64/hour for 30 hours week. Also in 1999, she worked as a driver for Camelot at $8.50/hour for 20 hours per month (Tr. at 857-858). In 2000 she worked for Child Development Center at $6.90/hour for 15-20 hours a week, for DCFS for $9.04/hour for 30 hours a week and for Camelot at 4-5 hours a week at 9.50/hour (Tr. at 858-860). She received no benefits from any of these jobs (Tr. at 856-857, 860).

Although Complainant testified she believed she had made $35,000.00 in 1995, on cross examination Complainant testified that her 1995 income tax return -- the last full year she worked for the Respondent -- indicated her yearly income was $24,955 and that she did not work anywhere else except for the Respondent during that year. So, it is reasonable to use $24,955 as the basis of the back-wage calculation.

I have calculated Complainant's 1996 wages to be $4,920 from Barber Coleman; $963.00 from Attus for one week in April and from May through November; and $1,300 from Child Development Center for one week in November and for December, for a total of $7183.00. Complainant would have received a 3% raise for 1996, which would have made her income at Barber Coleman $25, 703.00 The difference between $25,703 and 47,183 is $18,520.00 for 1996.

Complainant would not have received a 3% raise in 1997 (Wilson Tr. at p. 876, 877). because of the March 1996 incident, so her annual income would have remained at 25,703.00. Complainant made $12,791.00 in 1997. The difference between $25,703 and 12,791 is $12,912.

Wilson testified that all employees participated in a defined benefit plan (Tr. at p. 873), which operated to give all employees a 6.5% salary match at the end of the

year. Therefore, Complainant would have been entitled to 6.5 % on 25,703.00 for the end of 1996 and the end of 1997 for a total of $1.671(2) or $3,341.00.

Wilson testified that there was a 401 K investment program in place, and Complainant testified that she participated in the program by contributing 6% of her salary (Tr. at 847). Respondent did not dispute this contribution. Wilson testified that the Respondent would match 50% up to 6% (Tr. at 872); therefore, Complainant would have contributed 6% of 25,703.00 or $1,542.00, and employer would have contributed 50% of that or $771.00 for 1996 and the same amount for 1997. Employer is entitled to a 2-month credit of $129.00 for January and February of 1996.

Complainant is entitled to no lost benefit from the medical and dental plans Respondent had provided as she testified she was unsure of whether she had incurred any out of pocket expenses for medical or dental care for herself or her son since her termination, that her son is now covered by a medical insurance program through the state, and that she is now covered through her husband's work insurance program (Tr. at p. 868). Complainant submitted no testimony that she sought to replace these medical benefits or incurred any fees in purchasing substitute insurance or in paying for medical bills.

Therefore, Complainant is entitled to 18,520, 12,912, and in lost wages and $3,341.00, $771.00, and $642.00 in lost benefits for a total of $36,186.00

RECOMMENDATION

Based upon the foregoing, Complainant proved that Respondent discriminated against her on the basis of race when it discharged her. Accordingly, it is recommended that the Complaint in this matter be sustained and that Complainant be awarded the following relief:

A. That Respondent pay to Complainant lost wages in the amount of $31,432.00;

B. That Respondent pay to Complainant compensation lost in her defined benefit plan and 401K plan in the amount of $4,754.00;

C. The Respondent pay to Complainant prejudgment interest on the amounts in A and B to be calculated as set forth at 56 Ill.Admin.Code, Section 5300.1145.

D. That Respondent clear from Complainant's personnel records all references to the filing of the underlying charge of discrimination and the subsequent disposition thereof;

E. That Respondent pay to Complainant the reasonable attorney's fees and costs incurred in the prosecution of this matter, that amount to be determined after review of a motion and detailed affidavit meeting the standards set forth in **Clark and Champaign National Bank**, 4 Ill. HRC Rep. 193 (1982), said motion and affidavit to be filed within 21 days after the service of the Recommended Liability Determination; failure to submit such a motion will be seen as a waiver of attorney's fees and costs;

F. If Respondent contests the amount of requested attorney's fees, it must file a written response to Complainant's motion within 21 days of the service of said motion; failure to do so will be taken as evidence that Respondent does not contest the amount of such fees;

G. The recommended relief in paragraphs A through E is stayed pending resolution of the issue of attorney's fees and issuance of a final Commission order.

HUMAN RIGHTS COMMISSION

By:_____
SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section

ENTERED: September 10, 2001